

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ERIK C. STONEBRAKER,

Plaintiff,

vs.

SOCIAL SECURITY ADMINISTRATION.

Defendant.

Case No. 2:13-cv-01238-APG-GWF

FINDINGS AND RECOMMENDATION

This matter is before the Court on Plaintiff Erik C. Stonebraker's Complaint for Review of Final Decision of the Commissioner of Social Security (#2), filed on July 25, 2013. The Acting Commissioner filed her Answer (#11) on September 30, 2013. Plaintiff filed his Motion for Remand and/or Reversal (#14) on October 31, 2013. The Acting Commissioner filed her Cross Motion to Affirm (#15) on December 2, 2013. Plaintiff filed his Reply Brief (#16) on December 20, 2013.

BACKGROUND

A. Procedural History.

Plaintiff filed an application for a period of disability and disability insurance benefits on June 15, 2009, alleging that he became disabled on July 1, 2008. *See* Administrative Record (“AR”) 108-109. The Commissioner denied Plaintiff’s application initially on April 7, 2010, AR 64-67, and upon reconsideration on July 2, 2010. AR 69-71. Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). AR 72-73. The hearing was conducted on August 3, 2011 at which Plaintiff appeared and testified. AR 39-56. The ALJ issued his decision on September 21, 2011 and concluded that Plaintiff was not disabled from July 1, 2008 through the date of the decision. AR 28-34. Plaintiff’s request for review by the Appeals Council was denied on May 14,

1 2013. AR 1-7. Plaintiff then commenced this action for judicial review pursuant to 42 U.S.C. §
2 405(g). This matter has been referred to the undersigned magistrate judge for a report of findings
3 and recommendations pursuant to 28 U.S.C. §§ 636 (b)(1)(B) and (C).

4 **B. Factual Background.**

5 Plaintiff Erik C. Stonebraker was born on January 27, 1968. He was 43 years old at the
6 time of the hearing before the ALJ on August 3, 2011. Plaintiff graduated from high school in
7 1986 and completed real estate school in 1991. AR 137-138. Plaintiff is married and has three
8 children who were 17, 13 and 11 years old at the time of the hearing. AR 48.

9 **1. Plaintiff's Disability Reports, Work History Report and Hearing
10 Testimony.**

11 Plaintiff alleges that he became disabled on July 1, 2008 due to severe asthma, bronchitis
12 and high blood pressure. *See* Disability Report-Adult-Form SSA-3368. AR 130. Plaintiff reported
13 that he had been hospitalized many times for asthma, lung infections and pneumonia. He took four
14 or more breathing treatments daily and was taking high blood pressure medication which caused
15 him to get very tired. He reported that he had several asthma attacks in a month and his physician
16 Dr. Prabhu had declared him disabled. AR 130.

17 Plaintiff was employed as a real estate property manager from 1990 to 2000. AR 140. In
18 this job, he managed office employees, supervised and instructed maintenance workers, worked
19 with insurance companies, leased vacant rentals, dealt with tenant complaints/concerns, acquired
20 new business, inspected leased and vacant properties, and collected rent. AR 144. From 1999 to
21 2005, he was employed as a piano teacher. AR 140, 143. From July 2005 until April 2007,
22 Plaintiff was employed as an office manager for a real estate business. AR 140. He trained
23 employees, made ads, spoke on the telephone, did filing, typing, correspondence, tracked sales and
24 leads, and copied legal documents. AR 142. Plaintiff worked as an indexer from June 8, 2007 to
25 March 27, 2008. Plaintiff reported that all of these jobs required speaking, walking and other
26 bodily movements which he could not do without getting out of breath or coughing. He stated that
27 these tasks caused him to use up what little energy he had and he ended up having asthma attacks.
28 AR 149.

1 During the August 3, 2011 hearing, Plaintiff described his last job as a realtor's assistant.
2 He worked in this job during two periods; the first for two years and the second for four weeks. He
3 last worked in May 2008. AR 42. Plaintiff testified that he stopped working because the company
4 "went under" and his asthma was getting worse. He did not have insurance and was not able to get
5 medicine. AR 43. Plaintiff testified that he looked for other similar jobs and had five job
6 interviews in 2008, but did not get hired. Plaintiff testified that he would have gone to work if
7 someone would have hired him. AR 44.

8 Plaintiff was asked whether he thought he could still do an office job. He answered no,
9 stating that he constantly has to do breathing treatments. His asthma attacks occur all day long. The
10 physical requirement of a realtor office job would require too much getting up and down,
11 performing errands and going to the filing cabinet. He stated that speaking on the telephone would
12 be difficult because constant talking aggravates his asthma. While working in a prior clerical job,
13 the exposure to paper dust affected his lungs and caused him to fill up with mucus. AR 44-45.
14 Plaintiff also testified that on windy days he wears a mask if he goes out. He is also bothered by
15 strong fumes, such as cleaning products, perfume, or hand lotions. AR 51. Under questioning by
16 his counsel, Plaintiff testified that if he had gotten one of the jobs he applied for, he does not
17 believe he could have performed it. AR 51. He stated that he would need to take three or four
18 additional breaks during the work day to do his breathing treatments. AR 52.

19 Plaintiff testified that he can lift no more than a gallon of milk. He can stand for five
20 minutes and walk for five minutes. AR 44-45. Sitting is not an issue, but his ankles throb and
21 swell and he has to keep them elevated. AR 46. Talking more than 15 minutes causes him to have
22 shortness of breath. Walking more than 5 minutes, or bending over also causes shortness of breath.
23 He cannot use stairs. He also no longer plays the piano because he gets tightness after 10-15
24 minutes. AR 50.

25 Plaintiff described a typical day for him as follows: He wakes up between 4:00 and 6:00
26 a.m. His lungs are severely tight when he awakens and he has to do a breathing treatment,
27 sometimes two. (On the day of the hearing, he did four breathing exercises between 6:30 and 10:30
28 a.m.) After doing his breathing treatment he drinks some juice and relaxes for a couple of hours.

1 He then takes a shower and cleans up. He sits on a stool in the shower. The shower causes
2 moisture to build up in his apartment which causes him breathing difficulty. He stays inside most
3 of the day unless he has to go pick-up a prescription. He also goes to the store to pick up small
4 items, but for larger grocery shopping his children go with him to assist. He cooks food for his
5 children, making sandwiches or items in the crockpot so that he does not have to stand and cook.
6 AR 46. His daughter does the dishes and his son takes out the trash and vacuums. After dinner he
7 relaxes. AR 47.

8 Plaintiff testified that he watches television, and does some reading. He has a computer, but
9 his children use it more than he does. He will use the computer to check emails. He also texts on
10 his cellphone. AR 47-48. Plaintiff testified that he tries to go to the mall "but I don't go very far."
11 He and his family go to church every Sunday from 8:30 to 10:00 a.m. He states that by 10:00, he
12 has to do a breathing treatment. Id. He lives in an apartment, so there is no yard work. He does
13 not attend school functions for his children. AR 48.

14 Plaintiff does breathing exercises throughout the day, normally one every three hours. He
15 does a minimum of six to seven breathing treatments per day, including one during the middle of
16 the night. AR 49. Each exercise takes about 10-15 minutes. AR 47. The medication causes him
17 to shake and it takes 15 to 20 minutes for the shaking to subside. The medication will sometimes
18 wipe him out and he will sleep for about 30 minutes. AR 47. He takes his breathing machine with
19 him wherever he goes, because once he starts to get tight he needs to do a breathing treatment
20 immediately. If he does not do so, he will get tighter and it may then "take two or three more
21 treatments to get me loosened up." AR 50. Plaintiff also uses inhalers, but they do not work well
22 for him. AR 49.

23 **2. Medical Records.**

24 Plaintiff's records state that he is 6'2" tall and has weighed between 230 and 243 pounds.
25 According to the records, his weight has fluctuated up and down.

26 Plaintiff was seen at the University Medical Center Ambulatory Care facility on July 25,
27 2007 for chronic rhinitis, AR 219-22; on October 14, 2007 for productive cough and fever, with a
28 history of asthma and pneumonia, AR 215-18; and on October 28, 2007 for cough and congestion,

1 AR 211-14. Plaintiff was under the care of R.D. Prabhu-Lata K. Shete, M.D.'s Ltd. (hereinafter
2 "Prabhu clinic") from November 12, 2007 to May 18, 2009. AR 223-249. The initial record
3 indicates that Plaintiff was seen for follow-up on lab work and his request for allergy testing. His
4 physical examination on November 12th appeared to be unremarkable. AR 223-24. He was seen
5 on November 28, 2007 for a flare-up of his asthma with difficulty breathing and productive cough.
6 At that time, he was continued on his current medications, including Advair 500/50 mcg,
7 Combivent MDI, and albuterol nebulizers. He was prescribed additional medication and scheduled
8 for follow-up in two weeks. AR 226-28.

9 Plaintiff was next seen at the Prabhu clinic on December 12, 2007, at which time it was
10 reported that he had been suffering from asthma for four months. It was noted that he was treated
11 for shortness of breath in 2006 following bronchitis and was hospitalized at University Medical
12 Center in December 2006 for severe shortness of breath and pneumonia.¹ AR 229. Dr. Prabhu
13 noted that Plaintiff reported that he was short of breath at rest, and gets short of breath on minimal
14 exertion. "He cannot walk, climb steps or lift heavy objects." Plaintiff stated that he was having
15 frequent asthma attacks. The doctor noted that "[h]e uses several albuterol inhaler puffs during the
16 daytime and uses albuterol in SVN treatment anywhere between three to four times a night in
17 addition to his controller medications that include Advair and prednisone." AR 229. Dr. Prabhu
18 prescribed additional medication to the Plaintiff. AR 231. Plaintiff reported on January 18, 2008
19 that his asthma was now under a little better control. He was experiencing chest tightness and
20 wheezing for which the doctor prescribed additional medication. AR 233. Plaintiff was seen by a
21 physician's assistant on February 7, 2008, complaining of persistent cough with congestion for four
22 or five days. AR 236. He was not in acute distress. AR 237. The evaluation of a chest x-ray
23 taken on November 28, 2007 revealed no acute abnormalities. AR 238.

24 Plaintiff was seen at Fremont Medical Center on April 1, 2008 and again on June 23, 2008
25 for acute bronchitis and extrinsic asthma. AR 183-188.

26 . . .

27
28 ¹ Medical records for these earlier hospitalization are not part of the administrative record.

1 Plaintiff was next seen by a physician at the Prabhu clinic on August 20, 2008 for a refill of
2 asthma prescriptions. He had no complaints at that time, was not in acute distress and his lungs
3 were clear to auscultation bilaterally. He was scheduled for follow-up in eight weeks. AR 239-41.
4 Plaintiff returned on October 16, 2008 at which time he reported that his chest was tight, he was
5 wheezing and was finding it hard to breath. He was having an asthma attack. AR 242. On
6 physical examination, he was noted to be in moderate distress. Rare rhonchi were heard on
7 auscultation and wheezes were noted with prolongation of expiratory phase. AR 243.

8 Plaintiff was seen again by Dr. Prabhu on November 7, 2008 at which time he was
9 diagnosed with severe asthma. AR 245. Dr. Prabhu noted that Plaintiff had run out of all of his
10 medications² and was having severe shortness of breath with chest tightness and wheezing. Id. On
11 physical examination, he was found to be in moderate distress. His lungs were noisy with rhonchi
12 and wheezes on auscultation. AR 246. Dr. Prabhu stated under "Plan," that he would treat
13 Plaintiff with subcutaneous Brethine and IM Dep-Medrol. He was given some prescription for
14 prednisone and samples of Advair. Dr. Prabhu stated that he tried to arrange to get Xolair through
15 the company policy. AR 247. He scheduled Plaintiff for follow-up in one month or sooner if
16 needed. AR 248.

17 Plaintiff was admitted to University Medical Center on January 6, 2009 after being involved
18 in a motor vehicle accident in which he apparently sustained minor injuries. AR 189-194. While
19 in the hospital, his asthma condition was also evaluated and he was given a small-volume
20 nebulizers as well as oxygen. AR 191.

21 Plaintiff was admitted to Mountainview Hospital and Medical Center in April 2009 for
22 complaints of severe shortness of breath for 24 hours. AR 265-282. While in the hospital he was
23 evaluated for ischemia. His discharge diagnoses were: (1) Asthma exacerbation, (2) slight troponin
24 elevation, (3) leukocytosis secondary to steroids, (4) left lower lobe pneumonia, (5) probable
25 chronic obstructive pulmonary disease, rule out fungal allergic lung disease with ASPA. AR 265.

27 _____
28 ²This situation would appear to correspond with Plaintiff's loss of employment and health
insurance.

1 On May 18, 2009, Dr. Prabhu made the following Chart Note:

2 Mr. Erik Stonebraker was seen today in our office with severe
3 persistent asthma. This is in spite of the fact that he is on maximum
4 medical therapy including Xolair, prednisone, Advair, and ProAir.
We feel that the patient is totally and permanently disabled from
severe persistent asthma.

5 AR 249.

6 Plaintiff continued to receive treatment for his asthma and other upper respiratory
7 conditions at the Guadalupe Medical Centers from January 2010 through August 2010, AR 312-15,
8 and Canyon Gate Medical Group from October 2010 through May 2011. AR 319-52.

9 A State agency medical consultant, A. Ahmed, M.D., prepared a physical residual
10 functional capacity assessment of Plaintiff on April 1, 2010, which was based on the doctor's
11 review of the records. Dr. Ahmed stated that Plaintiff could occasionally lift or carry 10 pounds,
12 frequently lift or carry less than 10 pounds, could stand and/or walk with normal breaks at least 2
13 hours in an 8-hour workday, and could sit with normal breaks for 6 hours in an 8-hour work day.
14 He also stated that Plaintiff's ability to push and/or pull was unlimited other than as shown for his
15 lift and carry ability. He stated that Plaintiff could occasionally climb ramps or stairs, and could
16 occasionally balance, stoop, and kneel, but could never crouch or crawl. Dr. Ahmed noted no
17 manipulative or visual limitations. Under environmental limitations, he stated that Plaintiff had no
18 limitations to extreme heat, wetness or vibrations. He was required to avoid concentrated exposure
19 to extreme cold and humidity, and was to avoid even moderate exposure to hazards such as heights
20 and machinery. Dr. Ahmed did not check any limitation regarding fumes, odors, dusts, gases, or
21 poor ventilation. AR 299-303.

22 A second physical residual functional capacity assessment was prepared by State agency
23 medical consultant Karyn Doddy, M.D. on June 30, 2010. AR 304-311. Dr. Doddy's assessment
24 varied from that of Dr. Ahmed in that she stated Plaintiff could occasionally lift 20 pounds and
25 could frequently lift 10 pounds. AR 305. She also stated that Plaintiff could stand and walk up to
26 4 hours in an 8 hour day. Id. She found that Plaintiff could frequently balance. AR 306. Under
27 environmental limitations, Dr. Doddy stated that Plaintiff should avoid concentrated exposure to
28 extreme cold, extreme heat, wetness, and humidity. He should avoid even moderate exposure to

fumes, odors, dusts, gases, poor ventilation etc., and to hazards such as machinery or heights. Plaintiff had no limitations to noise or vibration. AR. 308. Dr. Doddy stated that she had reviewed Dr. Prabhu's 5/18/07 (sic) source statement regarding Plaintiff's physical capacity, but disagreed with it. Dr. Doddy stated: "He remains a strong patient advocate, but objective evidence presented supports claimant's ability to function within the limits of this RFC." AR 310.

3. Testimony of Vocational Expert.

Robin Scher, a vocational expert (VE) testified at the August 3, 2011 hearing. She testified that Plaintiff's past work included indexer, which is like a file clerk. It has Dictionary of Occupational Title (DOT) number 206.387-034. The VE stated that it is light level work and has an SVP (Specific Vocational Preparation) of 3. Plaintiff worked as real estate clerk, DOT 219.362-046, which is a sedentary job and has an SVP of 5. Plaintiff worked as a property manager, DOT 169.167-034. The VE testified that this is customarily performed at the sedentary level, but as performed by Plaintiff was light work. It had a customary SVP of 7, but the VE reduced it to 6 as it was performed. Plaintiff also worked as a music teacher, DOT 152.021-010, which is customarily performed as light work, but was performed by Plaintiff as sedentary work. It had an SVP of 7. The VE noted that during the hearing, Plaintiff testified that he worked as a data entry clerk, DOT 203.582-054, which is sedentary work and has a SVP of 4. AR 53-54.

The ALJ asked Ms. Scher to consider an individual who can lift 10 pounds, sit for six hours in an eight hour day, and stand and walk for two hours in an eight hour day. The individual must work in a job that has low exposure to dust and industrial pollutants and requires minimal talking. The ALJ asked whether such an individual would be able to perform any of Plaintiff's past work. The VE responded that the individual could perform Plaintiff's past work as a data entry clerk and music teacher. AR 54. Plaintiff's counsel asked Ms. Scher whether the individual could perform these jobs if in addition to the ALJ's hypothetical, the individual would need three to four additional breaks of 10 to 15 minutes each during the work day. Ms. Scher responded no. Id.

C. Administrative Law Judge's July 8, 2011 Decision.

The ALJ applied the five-step sequential evaluation process established by the Social Security Administration in determining whether Plaintiff was disabled. The ALJ found that

1 Plaintiff met the insured status requirements of the Social Security Act through September 30,
2 2010. He also found that Plaintiff had not engaged in substantial gainful activity since July 1,
3 2008, the alleged onset date of his disability. AR 30.

4 At step two, the ALJ found that Plaintiff had the following severe impairment: Asthma with
5 obstructive pulmonary disease (20 CFR 404.1520(c)). The ALJ also noted that Plaintiff is mildly
6 obese, which was not itself a severe impairment. He stated, however, that Plaintiff's obesity was
7 considered in conjunction with his other impairments in determining the severity and limiting effect
8 of the combination of impairments. AR 30.

9 At step three, the ALJ found that Plaintiff did not have an impairment or combination of
10 impairments that met or medically equaled one of the listed impairments in 20 CFR Part 404,
11 Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, and 404.1526). AR 30. In making this
12 finding, the ALJ noted Plaintiff's medical office treatment records for acute asthma exacerbations
13 as well as his hospitalization in April 2009 for acute exacerbation of his asthma. The ALJ stated
14 that “[t]he pulmonary function tests of record show signs of moderate obstructive airways disease,
15 but the validity of the tests have been compromised by findings of a lack of proper maneuvers.”

16 AR 30. The ALJ further noted that recent medical records indicated that Plaintiff had not required
17 emergency room or doctor office treatment for acute exacerbations of his asthma. The ALJ noted
18 that “he has been treated with Prednisone and has reported intermittent use of a nebulizer at home,
19 varying from four to five times a day to three times daily with no indication that such usage has
20 been consistent or that use of inhalers with a holding chamber such as an AeroChamber has been
21 contraindicated.” AR 30-31. The ALJ further noted that Plaintiff indicated at one point he was
22 using the nebulizer at night, “which would not impact on his ability to work directly.” AR 31.

23 Prior to step four, the ALJ found that Plaintiff had the residual functional capacity to
24 perform sedentary work as defined in 20 CFR 404.1567(a) except sit for six hours in an eight hour
25 day with normal breaks, stand and walk for two hours in an eight hour day, and low dust and
26 pollution free environment with no more than minimal talking. AR 31. In making this finding, the
27 ALJ summarized Plaintiff's hearing testimony regarding his daily activities and limitations,
28 including his testimony that he stopped working in May 2008 because the company went out of

1 business and that he applied for other work and “would have continued to work, if someone would
2 have hired him.” AR 31-32. The ALJ stated that Plaintiff’s medically determinable impairments
3 could reasonably be expected to cause his alleged symptoms. The ALJ found, however, that
4 claimant’s statements concerning the intensity, persistence and limiting effects of his symptoms
5 were not credible to the extent they were inconsistent with his determination of Plaintiff’s residual
6 functional capacity. AR 32.

7 The ALJ stated that “[a]s outlined above the claimant emphasized that he would have
8 continued working if he could have found a job, but the ability to perform work that exists in the
9 national economy, not availability of a specific job for the claimant or the hiring practices of
10 employers, is at issue in this case.” AR 32. The ALJ again noted that Plaintiff’s testimony that he
11 uses his nebulizer three to four times a day was in contrast to Dr. Prabhu’s December 2007 report
12 that he used the nebulizer machine at night. *Id.* The ALJ further stated that the current treating
13 source, Canyon Gate Medical Group, noted intermittently that the claimant reported use of the
14 nebulizer three to four times a day without mentioning use during the day or night. The same
15 source indicated that while Plaintiff consistently reported breathing problems, the physician
16 repeatedly found on examination since October 2010 that Plaintiff was not in pulmonary distress
17 and his lungs were clear. The ALJ stated: “Indeed, during this period, the claimant indicated his
18 pulmonary problems had improved and at one point he had been nearly 100% normal. *Id.* The
19 claimant’s subjective complaints including his assertion of needing nebulizer treatments three to
20 four times during the day are not wholly credible.” AR 32.

21 The ALJ discussed Dr. Prabhu’s chart note dated May 17, 2009 that Plaintiff was
22 completely disabled and noted that the State agency medical consultant disagreed with it. AR 32.
23 The ALJ stated that “[g]iven the claimant’s admissions at the hearing, and Dr. Prahbhu’s (sic) note
24 of the limitations the claimant reported in December 2007, little weight can be given to this broad
25 conclusory statement of disability, especially when the claimant was stable and in no need of
26 intense medical treatment of episodes of acute asthma exacerbation.” AR 32-33.

27 At step four, the ALJ concluded that Plaintiff was capable of performing his past work as a
28 data entry clerk (DOT 203.582-054). In so holding, the ALJ relied on the vocational expert’s

1 testimony that a person with Plaintiff's residual functional capacity could perform this work. AR
 2 33. The ALJ therefore concluded that Plaintiff had not been under a disability at any time from
 3 July 1, 2008 through the date of his decision. AR 33-34.

4 **DISCUSSION**

5 **I. Standard of Review**

6 A federal court's review of an ALJ's decision is limited to determining only (1) whether the
 7 ALJ's findings were supported by substantial evidence and (2) whether the ALJ applied the proper
 8 legal standards. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); *Delorme v. Sullivan*, 924
 9 F.2d 841, 846 (9th Cir. 1991). The Ninth Circuit has defined substantial evidence as "more than a
 10 mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind
 11 might accept as adequate to support a conclusion." *Woish v. Apfel*, 2000 WL 1175584 (N.D. Cal.
 12 2000) (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)); *see also Lewis v. Apfel*,
 13 236 F.3d 503 (9th Cir. 2001). The Court must look to the record as a whole and consider both
 14 adverse and supporting evidence. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Where the
 15 factual findings of the Commissioner of Social Security are supported by substantial evidence, the
 16 District Court must accept them as conclusive. 42 U.S.C. § 405(g). Hence, where the evidence
 17 may be open to more than one rational interpretation, the Court is required to uphold the decision.
 18 *Moore v. Apfel*, 216 F.3d 864, 871 (9th Cir. 2000) (quoting *Gallant v. Heckler*, 753 F.2d 1450,
 19 1453 (9th Cir. 1984)). *See also Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). The court
 20 may not substitute its judgment for that of the ALJ if the evidence can reasonably support reversal
 21 or affirmation of the ALJ's decision. *Flaten v. Sec'y of Health and Human Serv.*, 44 F.3d 1453,
 22 1457 (9th Cir. 1995).

23 It is incumbent on the ALJ to make specific findings so that the court need not speculate as
 24 to the findings. *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981), citing *Baerga v.*
 25 *Richardson*, 500 F.2d 309 (3rd Cir. 1974). In order to enable the court to properly determine
 26 whether the Commissioner's decision is supported by substantial evidence, the ALJ's findings
 27 "should be as comprehensive and analytical as feasible and, where appropriate, should include a
 28 . . .

1 statement of subordinate factual foundations on which the ultimate factual conclusions are based.”
 2 *Lewin*, 654 F.2d at 635.

3 In reviewing the administrative decision, the District Court has the power to enter “a
 4 judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,
 5 with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). In the alternative, the
 6 District Court “may at any time order additional evidence to be taken before the Commissioner of
 7 Social Security, but only upon a showing that there is new evidence which is material and that there
 8 is good cause for the failure to incorporate such evidence into the record in a prior proceeding” *Id.*

9 **II. Disability Evaluation Process**

10 To qualify for disability benefits under the Social Security Act, a claimant must show that
 11 (a) he/she suffers from a medically determinable physical or mental impairment that can be
 12 expected to result in death or that has lasted or can be expected to last for a continuous period of
 13 not less than twelve months; and (b) the impairment renders the claimant incapable of performing
 14 the work that the claimant previously performed and incapable of performing any other substantial
 15 gainful employment that exists in the national economy. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th
 16 Cir. 1999); *see also* 42 U.S.C. § 423(d)(2)(A). The claimant has the initial burden of proving
 17 disability. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir 1995), *cert. denied*, 517 U.S. 1122 (1996).
 18 If the claimant establishes an inability to perform his or her prior work, the burden shifts to the
 19 Commissioner to show that the claimant can perform a significant number of other jobs that exist
 20 in the national economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1074-75 (9th Cir. 2007).

21 Social Security disability claims are evaluated under a five-step sequential evaluation
 22 procedure. *See* 20 C.F.R. § 404.1520(a)-(f). *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir.
 23 2001). The claimant carries the burden with respect to steps one through four. *Tackett v. Apfel*,
 24 180 F.3d 1094, 1098 (9th Cir. 1999). If a claimant is found to be disabled, or not disabled, at any
 25 point during the process, then no further assessment is necessary. 20 C.F.R. § 404.1520(a). Under
 26 the first step, the Secretary determines whether a claimant is currently engaged in substantial
 27 gainful activity. *Id.* § 416.920(b). If so, the claimant is not considered disabled. *Id.* § 404.1520(b).
 28 Second, the Secretary determines whether the claimant’s impairment is severe. *Id.* § 416.920(c). If

1 the impairment is not severe, the claimant is not considered disabled. *Id.* § 404.152(c). Third, the
2 claimant's impairment is compared to the "List of Impairments" found at 20 C.F.R. § 404, Subpt.
3 P, App. 1. The claimant will be found disabled if the claimant's impairment meets or equals a
4 listed impairment. *Id.* § 404.1520(d). If a listed impairment is not met or equaled, the fourth
5 inquiry is whether the claimant can perform past relevant work. *Id.* § 416.920(e). If the claimant
6 can engage in past relevant work, then no disability exists. *Id.* § 404.1520(e). If the claimant
7 cannot perform past relevant work, the Secretary has the burden of proof at the fifth and final step
8 to demonstrate that the claimant is able to perform other kinds of work. *Id.* § 404.1520(f). If the
9 Secretary cannot meet his or her burden, the claimant is entitled to disability benefits. *Id.* §
10 404.1520(a).

11 **III. Whether the ALJ Erred at Step Four of the Sequential Process.**

12 In this case, the ALJ determined at step four of the sequential process that Plaintiff had the
13 residual functional capacity to perform his past work as a data entry clerk. In reaching this
14 conclusion, the ALJ rejected the credibility of Plaintiff's testimony regarding the severity of his
15 asthma symptoms and their debilitating effects. The ALJ also rejected the May 18, 2009 opinion of
16 Plaintiff's treating physician Dr. Prabhu that Plaintiff is totally and permanently disabled due to his
17 severe asthma.

18 **A. ALJ's Determination Regarding Plaintiff's Credibility.**

19 The ALJ cited three principal reasons for rejecting the credibility of Plaintiff's testimony
20 regarding the severity of his symptoms. First, the ALJ cited Plaintiff's hearing testimony that his
21 employment ended in May 2008 because the company he was working for went out of business,
22 and that he applied for and would have taken another job if one had been offered to him. Second,
23 the ALJ relied on Dr. Prabhu's December 12, 2007 office visit note in which he stated that Plaintiff
24 "uses several albuterol inhaler puffs during daytime and uses albuterol in SVN treatment anywhere
25 between three or four times during the night." AR 229. The ALJ found that this entry contradicted
Plaintiff's testimony in August 2011 that he took breathing treatments, i.e. used a nebulizer, several
times throughout the day. Third, the ALJ relied on Plaintiff's medical treatment records since
...
28

1 October 2010 which indicated that Plaintiff was not in pulmonary distress, his lungs were clear, and
 2 his pulmonary condition had improved.

3 Where there is no affirmative evidence showing that claimant is malingering, the
 4 Commissioner's reasons for rejecting the claimant's testimony regarding the severity or limiting
 5 effects of his symptoms must be clear and convincing. *Valentine v. Comm'r of Soc. Sec. Admin.*,
 6 574 F.3d 685, 693 (9th Cir. 2009), citing *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F. 3d 595,
 7 599 (9th Cir. 1999). The ALJ must specifically identify what testimony is credible and what
 8 testimony or evidence undermines the claimant's complaints. *Id.*

9 In *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005), the court further states:

10 In evaluating the credibility of pain testimony after a claimant
 11 produces objective medical evidence of an underlying impairment, an
 12 ALJ may not reject a claimant's subjective complaints based solely
 13 on a lack of medical evidence to fully corroborate the alleged severity
 14 of pain. See *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
 15 The rationale for this restriction is that pain testimony may establish
 16 greater limitations than can medical evidence alone. See SSR 96-7p
 17 (1996). In determining credibility, an ALJ may engage in ordinary
 18 techniques of credibility evaluation, such as considering claimant's
 19 reputation for truthfulness and inconsistencies in claimant's
 20 testimony. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir.
 21 2001). Additionally, Social Security Ruling 88-13 lists a number of
 22 factors the ALJ may consider:

- 17 1. The nature, location, onset, duration, frequency,
 18 radiation, and intensity of any pain; 2. Precipitating
 19 and aggravating factors (e.g., movement, activity,
 20 environmental conditions); 3. Type, dosage,
 21 effectiveness, and adverse side-effects of any pain
 22 medication; 4. Treatment, other than medication, for
 23 relief of pain; 5. Functional restrictions; and 6. The
 24 claimant's daily activities.

25 *Bunnell*, 947 F.2d at 346 (quoting SSR 88-13 (1988)) (superceded by
 26 SSR 95-5p (1995)); see also *Smolen v. Chater*, 80 F.3d 1273, 1284
 27 (9th Cir. 1996).

28 Plaintiff argues that the ALJ's reliance on Plaintiff's statement that he applied for work
 29 after his employment ended in May 2008 and would have worked if he had received a job offer,
 30 was taken out of context and does not support a finding that Plaintiff's testimony regarding the
 31 severity of his asthma symptoms was not credible. The Court agrees.

29 ...

1 The ALJ cited that part of Plaintiff's testimony in which he stated that he looked for other
2 office jobs and would have continued to work if someone had hired him. AR 31. The ALJ further
3 stated that "the claimant emphasized that he would have continued working if he could have found
4 a job . . ." AR 32. He also characterized this statement as an "admission." Id. The ALJ did not
5 discuss Plaintiff's other testimony relating to his ability or inability to work.

6 In response to the ALJ's initial question as to why he stopped working, Plaintiff stated
7 "The realtor I was working for, his company went under and my asthma was getting worse so I just,
8 wasn't able to work, didn't have insurance, didn't go get, wasn't able to get medicine or anything
9 and then we applied, me and my wife applied for Medicaid . . ." AR 43. In answer to the ALJ's
10 question whether he thought he could hold a job now, the Plaintiff said no and further stated: "I
11 constantly do have to do breathing treatments. My asthma attacks come whenever, all day long . . .
12 ." AR 44-45. Plaintiff went on to describe in some detail the problems he would have in
13 performing work duties. Id. Later in the hearing, Plaintiff's attorney asked him whether he
14 believed he could have performed the duties of the jobs he applied for if he had been hired.
15 Plaintiff answered "No, I wouldn't have been able to. I'd have let them know that I had asthma and
16 I do breathing treatments but sooner or later it would have caught up with me." AR 51.

17 The medical records show that Plaintiff was experiencing significant asthma symptoms by
18 December 12, 2007. AR 229. He continued to work, however, until May 2008. In August 2008,
19 Plaintiff was not in acute distress and his lungs were clear to auscultation bilaterally. AR 239-240.
20 On October 16, 2008, he was experiencing an asthma attack and was finding it hard to breath. AR
21 242. On November 7, 2008, he was experiencing severe shortness of breath and was in moderate
22 distress. AR 244-246. His symptoms were so severe in April 2009 that he was hospitalized for a
23 period of four days. AR 265-282. As of May 18, 2009, Dr. Prabhu concluded that Plaintiff was
24 suffering from severe, persistent asthma and was totally and permanently disabled. AR 249.
25 Plaintiff did not apply for disability benefits until June 2009, by which time the records indicate his
26 asthma symptoms were significantly worse than at the time he ceased working in May 2008.
27 . . .
28 . . .

1 In *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 (9th Cir. 2007), the court stated:

2 It does not follow from the fact that a claimant tried to work for a
 3 short period of time and, because of his impairments, *failed*, that he
 4 did not then experience pain and limitations severe enough to
 5 preclude him from *maintaining* substantial gainful employment.

6 Indeed, we have suggested that similar evidence that a claimant tried
 7 to work and failed actually *supported* his allegations of disabling
 8 pain. *See Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989)

9 The court further stated that where an individual attempts to work only because of extreme
 10 economic necessity, “it is at least as likely that the claimant tried to work in spite of his symptoms,
 11 not because they were less severe than alleged.” *Id.*, 504 F.3d at 1039.

12 Plaintiff’s effort to find work after he was terminated in May 2008, combined with the
 13 medical records showing that he was doing fairly well in late August 2008, would reasonably
 14 support a finding that he was still able to work at that time. The medical records also show,
 15 however, that Plaintiff’s asthma worsened in the fall of 2008 and into the spring of 2009. These
 16 records support Plaintiff’s testimony regarding the severity of his symptoms after November 2008.
 17 Plaintiff’s testimony also indicates that he pursued other employment because of economic
 18 necessity which is not inconsistent with his having experienced severe asthma symptoms at that
 19 time or later during the progression of his illness. The ALJ’s reliance on Plaintiff’s effort to obtain
 20 other employment to discount the credibility of his testimony regarding the severity of his
 21 symptoms is not supported by the record.

22 The ALJ’s reliance on Dr. Prabhu’s December 12, 2007 office visit note that Plaintiff was
 23 only using the nebulizer at nighttime to discount his hearing testimony also appears to be taken out
 24 of context of the record as a whole. The medical records show that Plaintiff experienced a flare-up
 25 or increase in the severity of his asthma symptoms in November and December 2007. He was still
 26 working at that time, however, and his use of inhalers during the daytime and a nebulizer at
 27 nighttime may well have been consistent with the nature and level of his symptoms at that time. As
 28 stated above, however, the records also demonstrate an increase in Plaintiff’s asthma symptoms in
 the fall of 2008 and into the spring of 2009. Plaintiff testified at the hearing that he takes breathing
 treatments, i.e., uses a nebulizer, throughout the day and evening. AR 49. He did not specify,
 however, for what period of time he had been taking breathing treatments at that frequency. There

1 is no indication in the Prabhu clinic records after the December 12, 2007 regarding the time or
 2 frequency at which Plaintiff performed breathing treatments.

3 The ALJ stated that the records from the current treating source indicates that Plaintiff
 4 reported use of a nebulizer three or four times a day without mentioning a use during the day or the
 5 night. AR 32, citing Canyon Springs Records. The ALJ also states “that the same source has
 6 indicated while claimant was noted to be reporting persistent breathing problems, he was repeatedly
 7 found on examination since October 2010 to be in no pulmonary distress and to have clear lungs.”
 8 *Id.* The Court has reviewed those records, which are hand-written office visit notations. The
 9 records do not provide a coherent narrative description of Plaintiff’s symptoms, physical
 10 examination findings or the physician’s assessments. *See* AR 316-339. While the Court cannot
 11 state that the ALJ’s interpretation of those records is incorrect, it also cannot confirm his
 12 interpretation based on its own review of the records. Furthermore, the ALJ may not reject a
 13 claimant’s subjective complaints based solely on a lack of medical evidence to fully corroborate the
 14 alleged severity of pain. *Burch v. Barnhart*, 400 F.3d at 680. This prohibition should be even more
 15 applicable when the medical records relied on by the ALJ are themselves ambiguous, incomplete or
 16 indecipherable.

17 This Court therefore finds that the ALJ failed to set forth clear and convincing reasons for
 18 rejecting the Plaintiff’s testimony regarding the severity of his symptoms. That said, the record
 19 also does not clearly demonstrate at what point in time Plaintiff’s symptoms reached that level of
 20 severity to support his disability claim.

21 **B. The ALJ’s Rejection of Dr. Prabhu’s Opinion that Plaintiff Was Disabled.**

22 Plaintiff’s treating physician, Dr. Prabhu, opined on May 18, 2009 that Plaintiff “is totally
 23 and permanently disabled from severe persistent asthma.” AR 249. Dr. Prabhu did not state when
 24 Plaintiff became totally disabled. Nor did he elaborate on the basis for his opinion, other than to
 25 state that Plaintiff was “on maximum medical therapy.” *Id.* In rejecting Dr. Prabhu’s disability
 26 opinion, the ALJ stated:

27 Given the claimant’s admissions at the hearing, and Dr. Prabhu’s
 28 note of the limitations the claimant reported in December 2007, little

1 weight can be given to this broad conclusory statement of disability,
 2 especially when the claimant was stable and in no need of intense
 3 medical treatment of episodes of acute asthma exacerbation.

4 AR 33-33.

5 The ALJ did not expressly give more weight to the opinions of the reviewing State agency
 6 physicians who provided physical residual functional capacity assessments. The ALJ did, however,
 7 find that Plaintiff had a residual functional capacity that, with certain additional limitations, was
 generally in accord with the assessments of the State agency physicians.

8 “Generally, a treating physician’s opinion carries more weight than an examining
 9 physician’s, and an examining physician’s opinion carries more weight than a reviewing
 10 physician’s.” *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001). If the treating
 11 physician’s “opinion on the issue(s) of the nature and severity of [a claimant’s] impairment(s) is
 12 well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not
 13 inconsistent with the other substantial evidence,” it should be afforded more weight. 20 CFR
 14 416.927(d)(2). The ALJ need not accept an opinion of a treating physician, however, if it is
 15 conclusory and not supported by clinical findings. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th
 16 Cir. 1992). *See also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) (“The ALJ need not
 17 accept the opinion of any physician, including a treating physician, if that opinion is brief,
 18 conclusory, and inadequately supported by clinical findings.”) If the treating physician’s opinion is
 19 contradicted by another physician, then the treating physician’s opinion can only be rejected by the
 20 Secretary for specific and legitimate reasons, supported by substantial evidence in the record for so
 21 doing. *Lester v. Charter*, 81 F.3d 821, 831 (9th Cir. 1996).

22 The ALJ’s cited reasons for according little weight to Dr. Prabhu’s disability opinion do not
 23 provide legitimate grounds for rejecting his opinion. The medical evidence supports the finding
 24 that Plaintiff’s asthma condition continued to significantly worsen after August 2008. Therefore,
 25 while Dr. Prabhu’s opinion that Plaintiff was totally and permanently disabled may not have been
 26 applicable to his condition in May-August 2008, it could reasonably apply to his condition on May
 27 18, 2009 and for some time period prior thereto. Likewise, Plaintiff’s limitations or treatment
 28 needs in December 2007 are not particularly relevant to his condition in May 2009, in the face of a

1 record showing that his condition worsened. On the other hand, Dr. Prabhu's May 18, 2009
 2 opinion that Plaintiff was totally and permanently disabled was both broad and conclusory. Dr.
 3 Prabhu did not provide an onset date for Plaintiff's alleged total disability and he did not attempt to
 4 explain or support his opinion by any discussion of Plaintiff's level of symptoms or how that
 5 impacted his activities of daily living or ability to perform certain work tasks. It was, therefore, not
 6 incumbent on the ALJ to accept that opinion.

7 The decision of the ALJ should be reversed because he failed to provide clear and
 8 convincing reasons for rejecting the credibility of Plaintiff's testimony regarding the severity of his
 9 symptoms. Similarly, the ALJ's cited reasons for giving little weight to the disability opinion of
 10 Plaintiff's treating physician are not legitimate grounds for rejecting his opinion.

11 **IV. Whether This Case Should Be Remanded for An Award of Benefits or for
 12 Further Administrative Proceedings to Determine Whether Plaintiff is
 Disabled.**

13 There is a split of authority in the Ninth Circuit in regard to whether an application for
 14 social security disability benefits should be remanded for an award of benefits or further
 15 administrative proceedings when the court determines that the ALJ failed to provide legally
 16 sufficient reasons for rejecting the claimant's testimony and his treating physician's opinions.

17 In *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004), the court stated as follows:

18 Remand for further administrative proceedings is appropriate if
 enhancement of the record would be useful. *See Harman*, 211 F.3d at
 19 1178. Conversely, where the record has been developed fully and
 further administrative proceedings would serve no useful purpose,
 the district court should remand for an immediate award of benefits.
See Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996); *Varney v.*
Secretary of Health and Human Services, 859 F.2d 1396, 1399 (9th
 20 Cir. 1988). More specifically, the district court should credit
 evidence that was rejected during the administrative process and
 21 remand for an immediate award of benefits if (1) the ALJ failed to
 provide legally sufficient reasons for rejecting the evidence; (2) there
 22 are no outstanding issues that must be resolved before a
 determination of disability can be made; and (3) it is clear from the
 23 record that the ALJ would be required to find the claimant disabled
 were such evidence credited. *Harman*, 211 F.3d at 1178; *see also*
McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002);
 24 *Smolen*, 80 F.3d at 12920.

25 Where the *Harman* test is met, we will not remand solely to allow the
 26 ALJ to make specific findings regarding excessive pain testimony.
 Rather, we take the relevant testimony to be established as true and

1 remand for an award of benefits. *Varney*, 859 F.2d at 1401; *see also*
 2 *Reddick v. Chater*, 157 F.3d 715, 728 (9th Cir. 1998) (quoting
 3 *Varney*); *Lester*, 81 F.3d at 834 (same); *Swenson v. Sullivan*, 876
 4 F.2d 683, 689 (9th Cir. 1989) (same); *but cf. Connell v. Barnhart*,
 5 340 F.3d 871, 876 (9th Cir. 2003) (holding that the court has
 6 flexibility in crediting petitioner's testimony if substantial questions
 7 remain as to her credibility and other issues must be resolved before a
 8 determination of disability can be made).

9
 10 The court in *Benecke* held that the ALJ's rejection of the claimant's testimony regarding the severity of her fibromyalgia symptoms and the opinions of her treating physicians regarding her physical limitations was in error. Because the vocational expert testimony established that the claimant was unable to perform a sedentary job based on her credited symptoms and physical limitations, the court held that remand for administrative proceedings would serve no useful purpose and was unwarranted. *Id.* 379 F.3d at 596.

11 In *Connell v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003), however, another Ninth Circuit
 12 panel stated as follows:

13 . . . [W]e are not convinced that the "crediting as true" doctrine is
 14 mandatory in the Ninth Circuit. Despite the seemingly compulsory
 15 language in *McCartey* and *Swenson*, there are other Ninth Circuit
 16 cases in which we have remanded solely to allow an ALJ to make
 17 specific credibility findings. In *Dodrill*, for example, our court
 18 specifically remanded for the ALJ to "articulat[e] specific findings
 19 for rejecting [the claimant's] pain testimony and the testimony of lay
 20 witnesses." 12 F.3d at 919. In *Nguyen v. Chater*, where the ALJ
 21 failed to consider the claimant's testimony with regard to his asthma,
 22 our court remanded with the specific proviso that "[i]t is not our
 23 intent ... to preclude the ALJ from reopening the hearing to receive
 24 additional evidence," including, presumably, evidence regarding the
 25 claimant's credibility. 100 F.3d 1462, 1466-67 (9th Cir. 1996). *See*
 26 *also Byrnes v. Shalala*, 60 F.3d 639, 642 (9th Cir. 1995) ("We
 27 therefore remand this case to the ALJ for further findings evaluating
 28 the credibility of [the claimant's] subjective complaints....").

An arguable distinction between *Benecke* and *Connell* is that in *Benecke*, there was no basis in the record to support the ALJ's rejection of the claimant's testimony regarding the severity of her fibromyalgia symptoms, whereas in *Connell* the record arguably contained evidence that would have supported the ALJ's decision if he had cited that evidence in support of his decision. In any event, the conflict in the Ninth Circuit case law on this issue has not yet been resolved. *See Vasquez v. Astrue*, 572 F.3d 586, 593 (9th Cir. 2009).

29 . . .

1 In *Esposito v. Astrue*, 2012 WL 1027601, *8 (E.D.Cal. 2012), the district court commented
 2 on the Ninth Circuit conflict as follows:

3 District courts are thus commanded by the *Benecke* line of cases to
 4 remand for payment of benefits if the three-part test discussed above
 5 is met, but simultaneously instructed by *Connell* that they need not
 6 remand for payment of benefits under the same circumstances. As
 7 the *Benecke* line of authority appears to require this court to remand
 8 for payment of benefits if the precedent conditions are met, and the
 9 *Connell* line of cases merely permits, but does not require, this court
 10 to remand for further proceedings in the same circumstances, this
 11 court seems bound to apply the *Benecke* line of cases. Indeed,
 12 *Connell* does not explain how this court should decide whether to
 13 apply the credit-as-true rule, but merely suggests that we have
 14 flexibility in choosing which claimants receive benefits on remand
 15 when the same precedent conditions are met. Such an approach
 16 invites arbitrary decision-making and impermissible re-weighing of
 17 the medical evidence by this court. Thus, until the Ninth Circuit
 18 resolves this issue en banc, this court will follow the *Benecke* test.

19 See also *Wilson v. Astrue*, 2011 WL 609801, *11 (D.Or. 2011) (noting that decisions after
 20 *Connell* decline to endorse that case's flexible approach and instead frame the credit-as-true rule as
 21 encouraged if not altogether mandatory).

22 In this case, the record is unclear as to when Plaintiff's asthma symptoms reached the level
 23 of severity and debilitating effects that he described during his testimony on August 3, 2011. The
 24 record supports a finding that his symptoms had not yet reached a disabling level when he stopped
 25 working in May 2008 or as of the alleged onset date of July 1, 2008. His symptoms were arguably
 26 disabling by May 13, 2009 when Dr. Prabhu declared him totally and permanently disabled. Based
 27 on these uncertainties, remand for further hearing is appropriate to determine if and when
 28 Plaintiff's asthma symptoms reached the level of severity that precluded him from performing his
 past sedentary work or other available work in the national and local economy.

CONCLUSION

29 The ALJ failed to provide clear and convincing reasons for rejecting the credibility of
 30 Plaintiff's testimony regarding the severity of his asthma symptoms. Similarly, the ALJ's cited
 31 reasons for giving little weight to the disability opinion of Plaintiff's treating physician are not
 32 legitimate grounds for rejecting his opinion. The ALJ's determination that Plaintiff was not
 33 disabled at any time from July 1, 2008 through the date of his decision is not supported by

1 substantial evidence and should be reversed, and this matter remanded for further hearing.

2 Accordingly,

3 **RECOMMENDATION**

4 **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion for Remand and/or Reversal
5 (#14) be **granted** and Defendant's Cross Motion to Affirm (#15) be **denied** and that this case be
6 remanded to the Commissioner of Social Security for further hearing consistent with this
7 recommendation.

8 **NOTICE**

9 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
10 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
11 held that the courts of appeal may determine that an appeal has been waived due to the failure to
12 file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit
13 has also held that (1) failure to file objections within the specified time and (2) failure to properly
14 address and brief the objectionable issues waives the right to appeal the District Court's order
15 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,
16 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

17 DATED this 5th day of June, 2014.

18
19 
20 GEORGE FOLEY, JR.
United States Magistrate Judge